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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/901,713	07/28/1997	ANDREA F. BELL	400-009	9451

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EXAMINER

FOSTER, JIMMY G

ART UNIT PAPER NUMBER

3728

DATE MAILED: 10/20/2003

36

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

08/901,713

Applicant(s)

BELL, ANDREA F.

Examiner

Jimmy G Foster

Art Unit

3728

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-31 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-31 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

Art Unit: 3728

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-26 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lindsay (4,993,551) in view of Anderson (5,209,384). In the reference of Lindsay, there is provided a the tool holder 10 which is used on a support device (a bucket) 12. Said support device has an interior, and exterior, an opening, a lip/upper rim and a longitudinal axis; see, for example, Figure 1. The tool holder constitutes an apron since it is formed of a pliable material (cotton duck fabric or sheet material or film material) that drapes over the inner and outer surfaces of the support device/bucket.

The apron/tool holder defines a shell 20,22,24, including a lip at 20, an interior surface at 22, and an exterior surface at 24. Each of said interior and exterior surfaces includes tool receiving pockets, which pockets are spaced from the longitudinal axis of the support device, as shown in the drawings. The exterior surface includes a plurality of pockets 28 disposed

Art Unit: 3728

thereon, and the interior surface includes a plurality of pockets 26 disposed thereon.

Although the reference of Lindsay does not disclose a resilient pocket opening, the reference of Anderson, at 60 and at column 5, lines 59-64, suggests that the opening/top of a pocket (58) in a tool holder/kit may be provided with an elastic band (60), which would make the pocket a resilient pocket opening, for the purpose of holding tools in place (i.e. against falling out). This appears to be a function relevant to a function argued by Applicant (see Applicant's Appeal Brief filed on October 9, 2002, page 12, last three lines). The Anderson reference states that the elastic band requires some amount of force to insert a tool into the pocket, whereupon once the tool is in the pocket, a similar force is required to withdraw the tool from said pocket. Accordingly, it would have been obvious in view of Anderson to have provided elastic bands at the openings of the pockets 26, 28 of Lindsay for the purpose of resiliently retaining tools in place against inadvertent removal.

Regarding claims, 3-8, 12-17 and 21-26, which call for specific pocket dimensions or capacities, although the reference of Lindsay does not disclose specific sizes for the pockets 26 and 28 of the holder 10, it would have further been obvious to have made the pockets with any sizes desired, including the sizes claimed by Applicant, since it has been held that the particular

Art Unit: 3728

size of an article generally will not support patentability. In re Rose, 105 USPQ 237, 240 (CCPA 1955); In re Yount, 80 USPQ 141.

This rejection further considers the evidence (if any) of non-obviousness that is presented by the declaration of George E. Millican, Jr, in addition to the prima facie case of obviousness provided by the above applied references of prior art.

Firstly, the examiner finds that there are statements made by the declaration that lack a nexus with the claimed invention. Paragraph 6 of the declaration refers to a bucket or a caddy. No bucket or caddy is called for in the claims. Instead, claims 1-18 and 27-30 call for a support device that has an opening. And in claims 19-26 even the support device is only claimed in an intended-use format. In addition, the examiner finds that the declaration lacks probative value since it lacks any evidence that shows one of the following: unexpected results, commercial success, solution of long-felt need, inoperativeness of a reference, invention before the date of a reference, or an allegation of an author of one of the references that his invention was derived from the applicant. See MPEP 716.01(c).

Specifically, regarding unexpected results, no showing has been made that the use of an elastic in a pocket opening of a utility apron would function in an unexpected manner. In fact, the declaration in paragraph 7 tends to support the notion that the elastic would function in the same manner as is taught or is evident in the prior art.

Art Unit: 3728

Specifically regarding a solution of long-felt need, the declarer has failed to establish that such a solution has been made with respect to the known closest prior art device, such as an apron like that of Lindsay. The closest known device mentioned in paragraph 6 of the declaration is a caddy or bucket; no apron is mentioned. The declaration must compare the invention to the closest prior art. MPEP 716.02(e). Although paragraph 7 does mention *prior utility aprons*, it fails to indicate a need that was long-felt, to which the invention provided a solution. No factual data, such as multiple or ongoing events of mishaps or problems with prior aprons, and dates of such events, has established a long-felt need regarding improvement over such aprons.

At most, the declaration of George E. Millican, Jr. is a showing of novelty, not unobviousness, since the declaration merely points out what is evident from a comparison of the disclosure of the invention with the device of Lindsay, that the invention distinguishes over the prior art aprons by providing a resilient material in the pocket. But the rejection is not with respect to anticipation; it is with respect to obviousness. The declaration provides no significant probative value with respect to non-obviousness for the reasons stated above.

This rejection further considers the evidence (if any) of non-obviousness that is presented by the declaration of Andrea F.

Art Unit: 3728

Bell in addition to the prima facie case of obviousness provided by the above applied references of prior art.

The examiner is not persuaded that the declaration of Andrea F. Bell sufficiently establishes long-felt need. It is unclear from the declaration just how many times the declarant saw a pocket being ripped by stuffing oversized items therein. Moreover, there is no factual indication that anyone but declarant/applicant may have had this difficulty. Moreover, it is unclear how long the declarant had this problem. No documentation, such as a memo to employees to stop stuffing oversized contents into the pockets, appears to corroborate that this problem existed.

The declarant states that often in attempting to stuff and remove a large container into/from a non-resilient pocket of the prior art, this ripped the pocket or disengaged the pocket from the bucket. However, the examiner is not persuaded that pocket rips due to the cramming of too-large objects can be solved by merely providing elastic in the mouth of the pocket. Elastic will not give a pocket greater capacity when it is added to the pocket material. In other words, placing elastic in a pocket material will not increase the capacity of the pocket. Therefore, trying to stuff an oversized object into a pocket which has an elastic mouth will not prevent the pocket from ripping when the material is overstressed due to excessive tension. Moreover, the accidental disengagement of a pocket

Art Unit: 3728

caddy from the bucket when trying to remove an oversized object from the pockets will not be overcome by placing elastic in the pocket mouth. The answer to such a problem always is to make the pockets larger.

However, the improvement that elastic provides to larger pockets, i.e. that of grasping the contents of the pockets, is already suggested in the art.

In addition, the examiner is unpersuaded that the declaration of Andrea F. Bell demonstrates commercial success. The declarant states that 4,000 units of the claimed invention have been sold to date. But it is unclear from the declaration what length of time is meant by "too date". The declaration states that development began in 1996. However, it is unclear when the declarant first provided the product for sale.

In addition, there is no way for the examiner to determine the importance of the number "4,000" since the declarant has failed to disclose what percentage of the pocket caddy market this represents.

In addition, it is unclear how much Applicant had invested in marketing and advertising to achieve the sale of the 4,000 units. Also it is unclear whether the price was greater or less than the nearest competitor (which presumably did not have elastic pockets).

The declarant Bell has stated that the product has been sold to retailers but has provided no details of these

Art Unit: 3728

transactions to permit the examiner to gauge the commercial success.

Regarding the Sacramento Home Show and the Arizona Family Women's Expo, it is unclear how many customers and potential customers made unfavorable comments regarding non-elastic pockets on other types of pocket caddies but made favorable statements about the elastic of Applicant's pockets. In addition, it is unclear whether the customers were asked about the problems with non-elastic pockets before they commented on the difference elastic and non-elastic pockets.

This rejection further considers the evidence (if any) of non-obviousness that is presented by the declaration of Gary Cohen in addition to the prima facie case of obviousness provided by the above applied references of prior art.

The examiner is not persuaded that the declaration of Gary Cohen demonstrates long-felt need. In fact, the declaration appears to indicate that the need is not long felt. The declaration calls for the unmet need to be unrecognized (part 11). For long felt need to be existent, it certainly must have been recognized.

In addition, Gary Cohen does not cite facts and dates that would indicate that there was a long-felt need existent. The declaration is merely conclusory.

Weighing the evidence of obviousness provided by the applied references of prior art together with whatever evidence

Art Unit: 3728

of non-obviousness that is provided by the declarations, the examiner finds that the evidence of obviousness indicated by the references is stronger/more compelling than the evidence of non-obviousness shown by the declarations.

3. Claims 27-31 are rejected under 35 U.S.C. § 103 as being unpatentable over Lindsay (4,993,551) in view of Anderson (5,209,384) as applied to claim 1, 9, 10, 18 or 19 above, and further in view of Baumgartner (3,678,977). The reference of Baumgartner suggests at 28 and at column 2, lines 20-22 that pleats may be provided in the sides of a resilient pocket (23,25) for the purpose of allowing expansion of the pocket to receive items in the pocket. This appears to correspond to Applicant's function for pleats. Therefore, it would have further been obvious in view of Baumgartner to have provided pleats in said pockets of Lindsay for the purpose of expanding the openings so as to receive items in the pockets.

The examiner's statements above regarding the declarations of George E. Millican, Jr, Andrea F. Bell and Gary Cohen are also incorporated into this rejection.

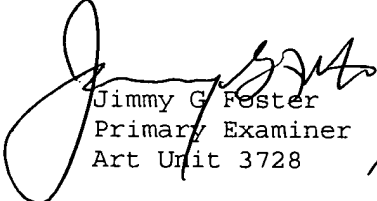
4. The arguments provided by Applicant in the Appeal Brief filed on October 9, 2002 have been considered but are deemed to be moot over the new grounds of rejection above which includes the secondary reference to Anderson.

Art Unit: 3728

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jimmy G Foster whose telephone number is (703) 308-1505. The examiner can normally be reached on Mon-Fri, 8:45 am - 5:15 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (703) 308-2672. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.


Jimmy G Foster
Primary Examiner
Art Unit 3728 10/17/03

JGF
17 October 2003